United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: November 21, 1996

TO : James S. Scott, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Associated Builders and Contractors 220-2550-8100
Case 32-CA-15647 512-5009-6700

This Section 8(a)(1) case was submitted for advice as to whether the Respondent's lawsuit against the Unions for maintenance of a "job targeting program" is preempted by the Act and/or is baseless and retaliatory under Bill Johnson's Restaurants v. NLRB.[1]

FACTS

The Charging Parties are various IBEW locals which collectively operate a job targeting program (JTP) in northern California. The program is aimed at preserving electrical work for Union members by subsidizing the wage costs of union-signatory contractors when they compete against non-union contractors on targeted jobs. The JTP covers private and public sector jobs, including prevailing wage projects under both the federal Davis-Bacon Act and similar California statutory provisions. The program is an agreed-upon provision of the Unions' contracts with individual employers as well as the northern California chapter of NECA. The JTP is funded entirely through Union membership dues; it is not funded through an additional special assessment on wages.

On July 8, 1994, Respondent Associated Builders and Contractors (ABC), a trade organization representing non-union contractors, filed a tort action against the Charging Party Unions in California state court. ABC contended that the JTP constituted unfair competition in violation of Section 17200 of the California Business and Professions Code because under the JTP, employers received kickbacks of employees' wages in violation of the California "Little

[1] 461 U.S. 731 (1983).

Davis-Bacon Act."[2] ABC, however, did not seek redress under the California prevailing wage statutes themselves.[3] ABC sought equitable and injunctive relief, including,

- enjoining the Unions from operating the JTP;
- the disgorgement of the JTP fund in the amount of approximately $10 million;
- restitution of lost wages to employees of all non-union employers which lost business because of the JTP;
- restitution of lost profits, overhead and market share to all non-union employers which lost business because of the JTP;
- enjoining the Unions from "requiring membership or the payment of equivalent dues as a condition for [employee] referral and/or employment on public works construction."

The suit only claims violations of California law; it does not allege that the JTP violated the Davis-Bacon Act or other federal laws.

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[2] California Labor Code section 1774 requires contractors to pay prevailing wages to employees working on public works projects; section 1778 makes it a felony for employers to receive any portion of the wages of an employee working on a public work project; section 1779 makes it a misdemeanor for any person to charge money for securing a job for an employee working on a public work project; section 1780 makes it a misdemeanor for an employer to pay money in order to place an order for employees to work on a public work project; and section 223 makes it unlawful for an employer to pay less than the prevailing wage rate where a statute requires the payment of the prevailing rate.

[3] The CDIR, a state agency discussed below, has taken the position that there is no private right of action to enforce California's prevailing wage statutes. See Tippett v. Terich, 44 Cal.Rptr.2d 862, 865 (1995). The California Supreme Court has not yet addressed this issue. Aubrey v. Tri-City Hospital District, 831 P.2d 317, 322 n.5 (Cal. 1992). Thus, ABC only seeks a remedy in tort for the Unions' alleged unfair business practices.

In late 1994 the Unions removed the state court action to federal court. On May 31, 1995, the District Court dismissed the action on the pleadings, holding that ABC's state law claims are preempted by Section 301 of the LMRA because they require the court to interpret the collective-bargaining agreement. ABC lodged an appeal of the dismissal with the Ninth Circuit Court of Appeals. The appeal has been fully briefed and oral argument was heard on October 2, 1996. The matter is currently under submission by the Circuit Court.

The State of California's Department of Industrial Relations (CDIR) concluded in 1994 that since the JTP at issue herein is funded through dues rather than assessments, the agency could not enforce the prevailing wage statutes without invoking NLRA preemption.[4] On the other hand, the federal Department of Labor's Wage Appeals Board (WAB) has held that a different IBEW JTP violated federal law.[5] The WAB concluded that a JTP unlawfully compensated union-signatory employers in violation of Davis-Bacon, the Copeland "anti-kickback" Act,[6] and the Labor Department's enforcing regulations.[7] According to the WAB opinion, JTP deductions in that case violated one of the fundamental principles underlying the Davis-Bacon Act, that employees' wages should not revert back to their employer. The WAB further reasoned that the JTP artificially increased

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[4] See *Subsidizing Contractors to Gain Employment: Construction Union "Job Targeting,"* 17 BERKELEY J. EMPLOYMENT & LAB. L. 62, 81 (1996). A CDIR attorney confirmed by telephone that the Department has not attempted to enjoin the IBEW JTP under the state prevailing wage laws. However, the CDIR has determined that area "actual prevailing rates" shall be reduced by the amount of the employees' JTP contributions. IBEW Locals 11, et al. v. Aubrey, 49 Cal.Rptr.2d 759 (1996).

[5] In re Building & Construction Trades Union Job Targeting Program, No. 90-02 (W.A.B. 1991), reported in LAB. L. REP. (CCH) ¶32,111 (1991).

[6] 18 U.S.C. sec.874, which provides criminal remedies against anyone who forces an employee working on a federal construction project to rebate part of his or her pay to an employer.

[7] See generally 29 C.F.R. Part 3.

prevailing wage rates in a manner inimical to Davis-Bacon, and rejected the union's argument that JTP deductions are authorized under 29 C.F.R. 3.5(i) which allows for payroll deductions to pay for union membership dues, not including fines or special assessments, provided that such deductions "are not otherwise prohibited by law." Rather, the WAB majority opinion held that JTP deductions from the paychecks of nonmember employees paying agency fees are "prohibited by law" under Communications Workers v. Beck[8] inasmuch as they do not pay for "core collective bargaining activities."[9] The United States District Court and the D.C. Circuit Court of Appeals affirmed the Labor Department's opinion.[10]

ACTION

We conclude that upon issuance of complaint, the Employer's lawsuit in its entirety is preempted by and violative of the Act. We further conclude that the lawsuit is retaliatory and, if the Unions ultimately prevail on appeal, would also be baseless such that its maintenance *ab initio* was an unfair labor practice.

The Supreme Court held in Bill Johnson's that the Board may enjoin as an unfair labor practice the filing and prosecution of a lawsuit only if the lawsuit lacks a reasonable basis in fact or law and was commenced with a retaliatory motive.[11] The Court specified that this analysis does not apply, however, if a lawsuit is preempted by federal law or was filed with an objective that is illegal under federal law.[12] Under San Diego Bldg. Trades

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[8] 487 U.S. 735 (1988).

[9] In re Building & Construction Trades, LAB. L. REP. (CCH) ¶32,111 at p. 44,051. Neither of the two concurrences found it necessary to adopt the majority opinion's discussion of Beck.

[10] Building and Construction Trades v. Reich, 815 F.Supp. 484 (D.D.C. 1993), aff'd 40 F.3d 1275 (D.C. Cir. 1994). See also IBEW Local 357 v. Brock, 68 F.3d 1194 (9th Cir. 1995) (JTP wage assessment is prohibited by Davis-Bacon Act).

[11] 461 U.S. at 743-44.

[12] Id. at 737 n.5.

Council v. Garmon,[13] a lawsuit is preempted when the activities at issue in the suit are "arguably subject" to the protections in Section 7 or "arguably prohibited" by Section 8. In such circumstances, the court "must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."[14] However, the Court noted that there is no preemption where the activity challenged in another forum either is of merely peripheral concern to the National Labor Relations Act or touches "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act."[15]

We first consider whether the causes of action asserted by the Employer in its lawsuit are preempted by the Act. Under Loehmann's Plaza,[16] where activity is arguably subject to the Act, preemption does not occur until the General Counsel issues complaint. After complaint issues, "if a preempted state court lawsuit is aimed at enjoining ... Section 7 activity, it is clear that ... the lawsuit is unlawful under Section 8(a)(1)."[17] However, the Board further noted that conduct under attack by a lawsuit is not "arguably" protected until the General Counsel issues complaint. Consequently, the legality of the lawsuit for the time that the action is maintained prior to the issuance of complaint is evaluated under Bill Johnson's standards.[18]

Initially, we conclude that ABC's lawsuit is preempted by the Act because it seeks to enjoin the Unions from operating an arguably protected job targeting program. In Manno Electric, Inc.,[19] the Board adopted a ALJD which held

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[13] 359 U.S. 236, 244-45 (1959).

[14] Id. at 245.

[15] Id. at 243-44 (footnote omitted).

[16] 305 NLRB 663 (1991).

[17] Id. at 671.

[18] Id. at 670.

[19] 321 NLRB No. 43 (May 22, 1996).

that the employer unlawfully brought suit in state court alleging, in part, that an IBEW JTP constituted tortious restraint of trade under Louisiana law. The ALJ concluded that the JTP is designed "to protect employees' jobs and wage scales,"[20] which is an objective that deserves the protection of Section 7 of the Act. Thus, the employer's suit to enjoin such arguably protected activity was preempted by the Act and constituted unlawful interference with employees' Section 7 rights.[21]

The lawsuit herein is no different from the suit at issue in Manno Electric. The goals of the JTP under attack in California similarly are to maintain prevailing rates and to procure work for bargaining unit employees. The Board adopted the judge's conclusion that this conduct is protected. Moreover, as set forth above, the California Department of Industrial Relations has indicated that it will not attack the JTP, funded by dues, in state court because of its view that the NLRA would preempt California's prevailing wage laws to the extent they implicate how union security dues may be spent. Thus, there is no countervailing state concern to protection under the Act, and accordingly we conclude that the JTP constitutes arguably protected activity.

In so concluding, we observe that the federal Department of Labor's decision, set forth above, has no effect on the outcome of this case. The Labor Department's decision necessarily involved an interpretation only of federal laws and regulations. It did not determine the legality of this JTP under California prevailing wage statutes, nor could it. Thus, the Labor Department's decision, as enforced by federal courts, sheds no light on the legality of this JTP under state, rather than federal, law. As discussed above, the relevant California state agency will not litigate, and the California judiciary has

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[20] Id., JD slip op. at 21.

[21] Chairman Gould and Member Browning adopted the JD in this regard without comment. Former Member Cohen concurred that the JTP involved arguably protected activity, but declined to pass on whether the lawsuit also had a "unlawful objective" within the meaning of Bill Johnson's. 321 NLRB No. 42, slip op. at 1 n.5.

voiced no opinion regarding, the legality of the JTP under state prevailing wage laws.

We further conclude that the Unions lawfully collected employees' JTP contributions as part of their regular Union dues subject to contractual union security and dues checkoff provisions. The second proviso to Section 8(a)(3) prohibits unions either to seek an employee's discharge for his or her failure to pay an "assessment" pursuant to a union security clause[22] or to use a checkoff authorization that permits deduction of only dues and fees to collect what is in reality an "assessment."[23] However, Board law regarding the definition of "dues" versus "assessments" is unclear. In Teamsters Local 959 (RCA Service Co.), *supra*, the Board enunciated the following test:

> It is clear that the term "periodic dues" in the usual and ordinary sense means the regular payments imposed for the benefits to be derived from membership to be made at fixed intervals for the maintenance of the organization. An assessment, on the other hand, is a charge levied on each member in the nature of a tax or some other burden for a special purpose, not having the character of being susceptible of anticipation as a regularly recurring obligation as in the case of "periodic dues."[24]

On the other hand, in Detroit Mailers,[25] the Board stated that any funds collected with regularity without a

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[22] Teamsters Local 959 (RCA Service Co.), 167 NLRB 1042 (1960).

[23] Food Fair Stores, 131 NLRB 756 (1961), enf'd 307 F.2d 3 (3d Cir. 1962); Plumbers Local 81 (Morrison Construction Co.), 237 NLRB 207 (1978).

[24] 167 NLRB at 1045 (emphasis in original). Applying this test, the Board in Teamsters Local 959 found credit union and building fund collections to be assessments rather than periodic dues. In a like vein, the Board has held that fees levied for the purpose of establishing or maintaining a strike fund are assessments and not dues, because they are levied for a special purpose. See, e.g., Food Fair Stores, 131 NLRB at 756.

[25] Detroit Mailers Union No. 40, 192 NLRB 951 (1971).

purpose inimical to public policy are periodic dues, not assessments. This test would permit forced collection of funds for a "special purpose" so long as that purpose was not offensive to public policy. Since Detroit Mailers, however, the Board has indicated its continued adherence to the Teamsters Local 959 "special purpose" test, without discussion of Detroit Mailers.[26] The Board has never reconciled the approaches taken in Teamsters Local 959 and Detroit Mailers.[27]

We conclude that under either of the above-described tests, the JTP at issue here is funded by Union dues rather than assessments. Although the collection of funds for the JTP would appear to have a "special purpose," the Unions have merely allocated a percentage of their operating dues for the member-approved job targeting fund. The Board has not in any case examined the internal allocation of Union funds to determine whether dues collected from members are allocated in such a way as to be considered "dues" or "assessments."[28] Thus, collections found by the Board to

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[26] United Brotherhood of Carpenters Local 455, 271 NLRB 1099 (1984); Teamsters Local 439 (Shippers Imperial), 281 NLRB 255 (1986).

[27] Recently, the Board has avoided distinguishing dues from assessments where possible. See UFCW Local 1 (Big V Supermarkets), 304 NLRB 952 (1991), enf'd 975 F.2d 40 (2d Cir. 1992); General Electric, 299 NLRB 995 n.3 (1990); Pacific Northwest Newspaper Guild Local 82 (The Seattle Times), 289 NLRB 902 (1988), modified 877 F.2d 998 (D.C. Cir. 1989) (Board agreed with ALJ's finding that the increased portion of dues were not sufficiently regular to be termed "periodic" and found it "unnecessary to pass on the judge's discussion of the standard to be applied in determining whether the purposes for which dues payments are expended will cause such payments to fall outside the definition of 'periodic dues' ...."). See also D.C. Circuit's decision in Seattle Times, 877 F.2d at 1003, remanding to the Board for a "coherent reconciliation of its own precedent." That case subsequently settled.

[28] In fact, most unions have separate building, pension, and other "funds," to which portions of operating dues are contributed, that are for a "special purpose" and could be termed "assessments" if the Board considered it appropriate to examine the internal allocation of dues.

constitute assessments have always been separate levies, in addition to the dues levy, to collect extra funds beyond those provided through dues collection. In our case since JTP contributions were merely a reallocation of "periodic dues," "uniformly required," the Unions did not go outside the bounds of the second proviso to Section 8(a)(3) by securing them pursuant to employees' checkoff authorizations.

ABC's lawsuit, like the suit at issue in Manno Electric, clearly interferes with and restrains employees in the exercise of arguably protected activities. Accordingly, we conclude that the lawsuit is preempted by the Act and that its continued maintenance subsequent to the issuance of the instant Section 8(a)(1) complaint is coercive and can be enjoined as violative of the Act.

However, as set forth in Loehmann's Plaza, we must apply a Bill Johnson's analysis to determine the legality of the institution and maintenance of the lawsuit prior to the issuance of complaint. The District Court dismissed the lawsuit on the pleadings; thus, it has been adjudicated as lacking a reasonable basis in law or fact. However, since the dismissal currently is under appeal before the Ninth Circuit, no final adjudication has been reached and the Region should hold in abeyance proceedings regarding the pre-complaint legality of the allegations involving the arguably protected Union activity until such time as the Ninth Circuit finally resolves the matter.[29] An affirmance of the dismissal by the Court of Appeals would establish a Bill Johnson's violation inasmuch as the lawsuit would be rendered baseless.[30]

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[29] Bill Johnson's, 461 U.S. at 746. Inasmuch as the parties are merely waiting for the court's decision and are unlikely to incur further expense, there is no need at this time to stay the Court's hand on preemption grounds.

[30] See Operating Engineers Local 520 (Alberici Construction), 309 NLRB 1199-1200 (1992), enf. den. on other grounds 15 F.3d 677 (7th Cir. 1994), where the Board concluded that it

> has consistently interpreted Bill Johnson's Restaurants to hold that if the plaintiff's lawsuit has been finally adjudicated and the plaintiff has not prevailed, its lawsuit is deemed meritless, and the Board's inquiry, for purposes

Finally, we conclude that ABC filed the lawsuit in retaliation against employees' protected activity. A retaliatory motive may be evidenced by a request for relief in excess of mere compensatory damages,[31] the fact that the lawsuit attacks conduct protected under Section 7[32] or, more generally, the baselessness of the lawsuit itself.[33] Here, ABC's lawsuit directly attacks arguably protected conduct, as discussed above. Additionally, it seeks the disgorgement of the Unions' $10 million JTP fund, apparently as restitution to the union-signatory contractors' contributing employees. This remedy would go well beyond what is required to compensate ABC's employer-members for their asserted losses. Certainly, none of these monies would be "returned" to ABC or its constituent non-union contractors. Rather, disgorgement would inure in favor of strangers to ABC and its membership, i.e. employees of their union-signatory competitors who are not in privity with ABC in any way. Moreover, ABC requested the court to enjoin the Unions from "requiring membership or the payment of equivalent dues as a condition for referral and/or employment on public works construction." In other words, ABC would have the court enjoin the Unions from collecting financial core payments pursuant to bargained-for union security clauses. This prayer for relief bears no resemblance whatsoever to ABC's losses. Rather, ABC strives to punish the Unions for engaging in protected, concerted activity by striking in an

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of resolving the unfair labor practice issue, proceeds to resolving whether the respondent/plaintiff acted with a retaliatory motive in filing the lawsuit.

[31] See, e.g., H.W. Barss, 296 NLRB 1286, 1287 (1989) (lawsuit found to be retaliatory where employer could not support its damages claim with examples of lost profits or customers); Phoenix Newspapers, 294 NLRB 47, 48-50 (1989) (Board held that $10 million in punitive damages sought for tortious interference with business relations and libel claims warranted finding that lawsuit was retaliatory).

[32] Phoenix Newspapers, 294 NLRB 49-50.

[33] Bill Johnson's, 461 U.S. at 747 (Board permitted to take into consideration court's determination that lawsuit was not meritorious in deciding whether lawsuit was retaliatory).

overbroad manner at conduct specifically countenanced by the Act. Therefore, we conclude that the prayer for overly broad relief, like a request for punitive damages in the cases cited above, establishes that ABC sought to retaliate against the Unions for engaging in protected, concerted activity. Accordingly, should the Ninth Circuit affirm the District Court, both prongs of the Bill Johnson's analysis would be satisfied and the institution and maintenance of the lawsuit concerning the arguably protected activity would constitute a further Section 8(a)(1) violation.[34]

In sum, we conclude that upon issuance of complaint herein, the Employer's lawsuit is preempted by and violative of the Act in its entirety. We further conclude that the lawsuit is retaliatory and, if the Unions ultimately prevail on appeal, would also be baseless such that its maintenance *ab initio* was an unfair labor practice.

B.J.K.

[34] [*FOIA Exemption 5*

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